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February 11, 2005

### **BY HAND DELIVERY**

The Honorable Vernon A. Williams  
Secretary  
Surface Transportation Board  
1925 K Street, N.W.  
Washington, D.C. 20423-0001

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RE: Finance Docket No. 34335  
*Keokuk Junction Railway Co.--Feeder Railroad Development Application*  
*--Line Of Toledo, Peoria & Western Railway Corporation Between*  
*La Harpe and Hollis, IL*

Dear Secretary Williams:

Yesterday, Toledo, Peoria and Western Railway Corporation ("TP&W") filed a letter proposing what it termed "an alternate solution" for providing TP&W with access to the shippers on the Mapleton Spur. TP&W also made several misleading statements with respect to their ability to access the shippers on the Mapleton Spur. Keokuk Junction Railway Co. ("KJRY") hereby replies to TP&W's letter.

A part of TP&W's "alternate solution" is for the Board to impose the recently filed Union Pacific Railroad Company ("UP")/KJRY trackage rights agreement (see Finance Docket No. 34664) as the form of the agreement that would govern TP&W's operations over KJRY's tracks between Hollis and the cutoff to the Mapleton Spur. TP&W requests that this agreement be imposed on KJRY instead of the trackage rights agreement that KJRY submitted on June 9, 2003 and the Board approved in its October 28, 2004 decision, which the Board reaffirmed in its February 7, 2004 decision. The Board should reject this request for two reasons.

First, consistent with its prior precedents, the Board should not impose a trackage rights agreement on KJRY, as the new owner of the Line.<sup>1</sup> In contrast, TP&W was given a choice to

<sup>1</sup> The Board has no general power to require a carrier to grant trackage rights over its lines. See *Chesapeake & Ohio Railway Co. - Abandonment*, 366 I.C.C. 53, 54 (1981). "[T]rackage rights are voluntary agreements between the affected parties. The statute, 49 U.S.C. 11343, requires an agreement by the carriers before we can exercise our jurisdiction in approving such transactions. Although the Commission has the power to impose trackage rights as a condition to a grant of other authority, *no condition of this nature was timely sought or imposed* on BN's acquisition of the track segment at issue here." (Emphasis added.) *Wisconsin Western Railroad Company, et*

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either accept or reject the trackage rights agreement proposed by KJRY. TP&W rejected the approved trackage rights agreement. As such, TP&W can still serve its Mapleton Spur shippers by stationing a locomotive on the Mapleton Spur and bringing the cars to the cutoff at Mapleton for interchange with KJRY. KJRY will then take those cars to Peoria for interchange back to TP&W or other carriers, just as TP&W does today. TP&W had a choice to use trackage rights instead of an interchange agreement, but knowingly chose not to. Doing so was at their own risk, as the Board specifically stated.

Second, the UP/KJRY agreement governs KJRY operations over UP's tracks. As such, that agreement is a UP agreement governing operations over UP tracks. Likewise, the trackage rights agreement that KJRY proposed, and that was approved by the Board, is an agreement governing operations over KJRY track. The agreement was modeled after several standard trackage rights agreements, and until just a few weeks ago, was never challenged by TP&W as being inadequate. TP&W had numerous opportunities to comment on the agreement, to discuss with KJRY proposed changes, and to reach agreement, but they refused to take any of these actions until just a few days ago. Now, having deliberately ignored these opportunities, TP&W seeks to have an alternate form of agreement imposed on KJRY. The Board should reject this approach.

The true "alternate solution" is either for TP&W to accept the Board-approved trackage rights agreement offered by KJRY or to work with KJRY to develop a mutually acceptable interchange arrangement. Indeed, to help facilitate interchange, KJRY sent a standard interchange agreement to TP&W and has been in discussions with them regarding changes and modifications. KJRY also sent two locomotives to Peoria for placement on the Line near Mapleton to stand prepared to interchange any Mapleton Spur traffic. As of the writing of this letter, TP&W had refused to allow those locomotives onto the UP line and they were still in Peoria. The Tazewell & Peoria Railroad ("TZPR") (formerly the "P&PU") has attempted to move those locomotives over the UP line between Iowa Junction and Hollis (Sommer), but TP&W, that dispatches the UP line, is refusing to dispatch the TZPR train over the line.<sup>2</sup> Obviously, TP&W is trying to frustrate KJRY's efforts to provide an adequate interchange for the Mapleton Spur shippers. KJRY stands willing and able to ensure that Mapleton Spur shippers have continued access to Peoria and connections with TP&W, UP, TZPR, and others.

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*al. v. Burlington Northern Railroad Company*, No. 39643, 1985 ICC LEXIS 496 (March 29, 1985) at \*4-\*5.

<sup>2</sup> UP owns that portion of the line between Hollis Station (Sommer) and the TZPR at Iowa Junction. KJRY now owns that part of the Line between Hollis and Mapleton. TZPR has trackage rights over the UP line, but that line is dispatched by TP&W. TP&W is refusing to allow TZPR to deliver KJRY's locomotives to Hollis. KJRY respectfully requests the Board to immediately direct TP&W to stop obstructing the TZPR trains from connecting with KJRY at Hollis.

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TP&W makes two other comments in its February 10 letter that need to be addressed. These comments involve the ownership of certain "pocket tracks" and the possibly slanderous allegations regarding KJRY's motives with respect to the Mapleton Spur shippers. For the first time in this proceeding, the TP&W now tells the Board that it desires to retain ownership of two "pocket tracks" because these tracks are necessary to support the operations of the Mapleton Spur. Both of these tracks lie within the TP&W right-of-way that is the subject of KJRY's feeder line application. As such, they were part of the Line ordered to be transferred in the October 28<sup>th</sup> decision. This is the first time that TP&W claims that such tracks are "necessary" to its operations at Mapleton or that it was excluding track within the main line right-of-way from the sale. KJRY believes that TP&W has adequate tracks within the Mapleton industrial complex for locomotive and car storage. However, if it becomes necessary, there are provisions in the proposed trackage rights agreement for the construction of additional track. If TP&W had accepted the trackage rights agreement, TP&W's concerns would have been addressed. As it stands, this is just another attempt by TP&W to delay and obstruct renewed operations. Because of TP&W's position, the Board should issue a clarification of its October 28th and February 7<sup>th</sup> decisions to make it clear that all sidings, pocket tracks, depots, etc. that were part of the Line as previously operated by TP&W are to be transferred to KJRY.<sup>3</sup>

With respect to KJRY's intentions regarding TP&W service to the Mapleton Spur shippers, TP&W letter filed yesterday claims that "some of TP&W's customers on the Mapleton Spur have been advised that TP&W will not be permitted by KJRY to serve them as of tomorrow" and further goes on to claim that KJRY is attempting to exclude TP&W from directly serving the shippers on the Mapleton Spur. Nothing could be further from the truth. To the extent TP&W implies that it is KJRY who is talking to TP&W customers about TP&W's access or service, such implications are entirely false. No personnel of KJRY or its parent company or its affiliates have said any such things to the Mapleton Spur shippers. As KJRY has stated many times, KJRY is prepared to ensure that the Mapleton Spur shippers continue to have access to TP&W and Peoria, either through TP&W's acceptance of the trackage rights agreement or through an interchange arrangement, where TP&W can directly serve the Mapleton Spur shippers through stationing a locomotive along that spur track and then interchanging those cars to/from KJRY at Mapleton (Kolbe). KJRY understands that these shippers represent important business for TP&W, and KJRY will cooperate to ensure that TP&W can directly serve them, either through trackage rights (if TP&W will accept the trackage rights agreement) or via interchange.

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<sup>3</sup> The Board may also want to take that opportunity to address the status of the property that TP&W transferred to its affiliate and others after the Board's October 23<sup>rd</sup> decision. The Board should make it clear that those properties should be transferred to KJRY as part of the Line. The mere fact that some of them may not have NLV does not mean that they do not have value, any more than the fact that much of the right-of-way is easement means that TP&W is entitled to keep it.

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If there are any questions about this matter, please contact me directly, either by telephone: (202) 663-7823 or by e-mail: [wmullins@bakerandmiller.com](mailto:wmullins@bakerandmiller.com). There are an original and eleven copies of this letter. Please time stamp the extra copy and return to the courier for delivery to me. Furthermore, by my signature below, I certify that I have on this date caused copies of this submission to be delivered to Louis E. Gitomer and Gordon P. MacDougall by courier, to Michael E. Roper, counsel for BNSF, by fax, and to be served on other parties of record by first class mail.

Respectfully submitted,



William A. Mullins

Attorney for Keokuk Junction Railway Co.

cc: All Parties of Record